IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH - CENTRAL DIVISION

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| TFG-NORTH CAROLINA, L.P., a Utah limited partnership,<br><br>Plaintiff,<br>v.<br><br>PERFORMANCE FIBERS, INC., a Delaware corporation, and PERFORMANCE FIBERS HOLDINGS, INC., a Delaware corporation,<br><br>Defendants.<br><br>PERFORMANCE FIBERS, INC., a Delaware corporation, and PERFORMANCE FIBERS HOLDINGS, INC., a Delaware corporation,<br><br>Counterclaim-plaintiffs<br>v.<br><br>TFG-NORTH CAROLINA, L.P., a Utah limited partnership, TFG HOLDINGS, INC., a Utah corporation, and TETRA FINANCIAL GROUP, LLC, a Utah limited liability company,<br><br>Counterclaim-defendants. | **FINDINGS OF FACT AND CONCLUSIONS OF LAW ON DAMAGES**<br><br>Case No. 2:08-CV-942<br><br>Judge Tena Campbell<br><br>Magistrate Judge David Nuffer |

In a previous order (Findings of Fact and Conclusions of Law, Dkt. No. 175), the court found that additional briefing on the issue of damages was necessary and ordered the parties to submit supplemental briefing on the issue. Having reviewed the evidence, the court finds that TFG-North Carolina, L.P. (TFG) is entitled to recover $710,796.51 as a result of Performance Fibers, Inc.'s (Performance Fibers) breach of the Lease, with pre- and post-judgment interest, calculated as follows:

**Base Term Payments**

TFG and Performance Fibers entered into a lease with an initial base term of twenty-four months and a monthly rental of $144,257.86. The base term ran from October 1, 2006, to October 1, 2008. Performance Fibers made twenty-one base term payments, ending in June 2008. Performance Fibers did not make the payments for July, August, or September 2008. TFG is entitled to recover these three base term payments of $144,257.86 each, for a total of $432,773.58.

Performance Fibers contends that TFG's recovery for the base term payments should be reduced by the amount Performance Fibers paid in interim payments.[1] But under Section 3(a) of the Lease, Performance Fibers may not "abate, set off or deduct any amount or damages from or reduce any base monthly rental . . . due for any reason." (Ex. 3 at 2.) The lease schedule makes clear that the base term was twenty-four months and that the base term started on the Base Term Commencement Date. (Ex. 5 ¶ 4.) Once the base term began, Performance Fibers was required to make twenty-four monthly payments of $144,257.86. The interim payments will not be applied to reduce the amount of base term payments Performance Fibers was required to make.

Reduction for Performance Fibers' Security Deposit

Performance Fibers paid a $144,257.86 security deposit in accordance with the Letter of Intent and Section 5 of the Lease Schedule. This deposit was to be applied to the last base term billing period. Accordingly, TFG's base term damages are reduced by $144,257.86.

[1] Performance Fibers made interim lease payments in July (partial), August, and September 2006.

Late Fees

Under Section 3(b) of the Lease, Performance Fibers agreed to pay a late fee of five percent on all missed rental payments. As discussed above, TFG is entitled to recover for two missed base term payments--the three base term payments that were not made less the security deposit that was to be applied to the last month's payment. The five percent late fee for each of these payments is $7,212.89, for a total of $14,425.78 in late fees.

**Twelve-Month Extension Period**

Paragraph 12 of the Lease Schedule sets forth the two negotiated end-of-term options: (1) the option to extend the lease or (2) the option to purchase the property. Paragraph 12 also states that if no notice was given electing one of the options, then the twelve-month extension of the lease would go into effect. Because Performance Fibers did not provide the required written notice, it elected the twelve-month extension at a monthly rate of $144,257.86. TFG is entitled to damages of $1,731,094.32 ($144,257.86 x 12) for the twelve-month extension period.

**Six-Month Extension Period**

TFG contends that it is entitled to recover $865,547.16 for an addition six months of payments due after the twelve-month extension period. Under Paragraph 12 of the Lease Schedule, at the end of the twelve-month extension period, "the Lease shall continue in effect at the rate specified in the respective Schedule for successive periods of six (6) months." (Ex. 5 ¶ 12.) This additional six-month extension period would have begun on October 1, 2009. But TFG knew in June 2008 that Performance Fibers was not going to honor the agreement. TFG was on notice during the original twelve-month extension period that Performance Fibers did not want

any additional extensions. Accordingly, the court finds that TFG is not entitled to recover damages for a second extension period.

**Reduction for the Security Deposit**

TFG's recovery is reduced by $1,323,239.31, which is the amount of the security deposit ($1,286,007.22) that was applied to Performance Fibers' note on July 22, 2008, plus interest of $37,232.09. (Dkt. No. 175 at 8-9; see also Def.'s Trial Exs., Ex. A.)

**Interest**

TFG contends that it is entitled to recover pre- and post-judgment interest at a rate of eighteen percent per year. But TFG concedes that the language of Section 19(m) of the Lease, on which it relies, is not explicit on this issue. Section 19(m) provides that TFG is entitled to "payments and expenses" it occurred in performing and complying with the agreement, together with interest of eighteen percent per year. (Ex. 3 at 16.) Because Section 19(m) sets forth the interest rate specifically for "payments and expenses," the court finds that TFG is not entitled to interest at eighteen percent. Rather, TFG is entitled to pre-judgment interest under Utah Code Section 15-1-1(2) at ten percent per year and post-judgment interest under 28 U.S.C. § 1961.

Prejudgment interest is appropriate because the amount owed to TFG is precisely calculable. Smith v. Fairfax Realty Inc., 2003 UT 41, ¶ 17, 82 P.3d 1064 ("Utah courts award prejudgment interest in cases where damages are complete and can be measured by fixed rules of evidence and known standards of value." (internal quotations omitted)). TFG is entitled to pre-judgment interest of ten percent per year on its recovery of $710,796.51. The pre-judgment interest is calculated from the date of October 1, 2008, when the base term expired and the

extension term amounts became due and owing due to the acceleration resulting from Performance Fibers' breach of the lease.

**Attorney Fees**

TFG has filed a motion for attorney fees (Dkt. No. 178). The motion was referred to United States Magistrate Judge David Nuffer and will be decided by Judge Nuffer in a separate order.

## ORDER

The court awards TFG damages in the amount of $710,796.51 plus pre-judgment interest at ten percent per year from October 1, 2008, to the date of judgment and post-judgment interest at the federal rate from the date judgment is entered.

SO ORDERED this 21st day of July, 2011.

BY THE COURT:

Tena Campbell

TENA CAMPBELL
United States District Judge